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No. 90-89

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, *et al.*,
*Petitioners,*

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, *et al.*,
*Respondents.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## BRIEF FOR RESPONDENT INSTITUTES FOR BEHAVIOR RESOURCES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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October 31, 1990

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a state court action seeking injunctive relief against agents and employees of a federal agency [in this case the National Institutes of Health ("NIH")] is subject to removal under 28 U.S.C. § 1442(a)(1) when the relief sought against such agents and employees is clearly set forth in the "Petition for Declaratory and/or Injunctive Relief," although the agents and employees are not individually listed in the caption of the Petition?

2. Whether private plaintiffs* who have secured a Temporary Restraining Order in state court, which order on its face affects property in which a federal agency (in this case NIH) has an interest, and who after removal to federal court secured an injunction against the agency and its agents, are entitled to a remand to state court by contending that there may be no federal interest to be protected?

3. In light of the clearly articulated federal policy [reflected in the Animal Welfare Act, 7 U.S.C. § 2131, *et seq.* (1982)] establishing an elaborate federal regulatory scheme for the protection of laboratory animals and precluding disruption of scientific research by private special interest groups, did the Fifth Circuit properly deny standing to the Primate League, which sought custody of privately owned research animals being used for NIH-sponsored scientific experiments?

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* All of the petitioners, appellants and plaintiffs below, International Primate Protection League and its members, People for the Ethical Treatment of Animals and its members, Alex Pacheco and Louisiana In Support of Animals, and its members, are for clarity and simplicity sometimes hereinafter referred to as "Primate League."

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## BRIEF FOR RESPONDENT INSTITUTES FOR BEHAVIOR RESOURCES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Institutes for Behavior Resources, Inc., respectfully requests that the petition for writ of certiorari be denied.

### OPINION BELOW

The opinion of the Court of Appeals is reported at 895 F.2d 1056. Petitioners' Appendix, A1-15, omits from the opinion of the Court of Appeals half a paragraph of text accompanying footnote 4.

### STATUTES INVOLVED

28 U.S.C. § 1442(a)(1) and the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* (1982).

## COUNTERSTATEMENT OF THE CASE

Respondent, Institutes for Behavior Resources, Inc. ("IBR"), objects to petitioners' statement of the case.[1] A more accurate statement of the facts can be derived from the Fourth Circuit opinion in *International Primate Protection League, et al.* v. *Institute for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987), where virtually identical prayers for relief to those in this action were asserted by two of the petitioners; from the IBR Brief in Opposition to the Petition for a Writ of Certiorari to the Fourth Circuit; and from the opinion below.

Dr. Edward Taub, the chief of the Behavioral Biology Center of the Institutes for Behavior Resources, Inc., was studying the capacity of monkeys to learn to use a limb after nerves had been severed. Funded by the National Institutes of Health ("NIH"), the project amplified Dr. Taub's earlier research in this area and attempted to discover benefits for the rehabilitation of human patients suffering from a serious neurological injury such as stroke. 799 F.2d at 936.

Alex Pacheco, then an undergraduate student, who, unknown to Dr. Taub, had founded People for the Ethical Treatment of Animals ("PETA"), offered to work as a volunteer for Taub at the IBR animal laboratory facility in Silver Spring, Maryland. Dr. Taub gave Pacheco the keys to the premises and permission to enter at any time, and Pacheco came regularly to the laboratory during the summer of 1981. Pacheco asked the Montgomery County Police Department to investigate IBR for animal cruelty under Section 59 of the Maryland Code.

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[1] For example, contrary to petitioners' statement that Dr. Taub's experiments were "terminated for unjustifiable cruelty," Pet. 3, the Department of Health and Human Services' Departmental Grant Appeals Board exonerated Dr. Taub as to all charges of animal cruelty. HHS-GAB, Decision No. 538, May 31, 1984.



The police obtained a search warrant from the Circuit Court for Montgomery County and on September 11, 1981 seized from IBR the 17 monkeys in the experiment. Subsequently, criminal charges were filed against Dr. Taub alleging 17 counts involving 119 violations of the Maryland animal cruelty statute. 799 F.2d at 936.

On October 9, 1981, the Circuit Court for Montgomery County, without opposition from IBR, directed the transfer of the monkeys to an NIH facility in Poolesville, Maryland. The order was to remain in effect "until further Order of this Court or the termination of the pending criminal prosecution against Dr. Taub, whichever occurs first." 799 F.2d at 936.

Dr. Taub stood trial in November 1981 in the District Court for Montgomery County, which entered orders of conviction for failure to provide "necessary veterinary care" for six monkeys and acquitted Dr. Taub of all the other 113 charges. Fearing that the court order on custody of the monkeys would partially expire with the acquittals, PETA acted quickly to prevent the return of any animals to IBR. Along with the International Primate Protection League and others, PETA filed a bill of complaint on December 3, 1981 in the Circuit Court for Montgomery County in which they purported to speak for "their own and class interests and as next friends of seventeen (17) non-human primates." PETA alleged that a civil inquiry would show IBR violations of the Maryland animal cruelty laws and the federal Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* PETA asked the court to designate the plaintiffs as guardians of the monkeys, and to enjoin all parties from permitting IBR to regain possession. 799 F.2d at 936.

NIH removed the case to the U.S. District Court for the District of Maryland pursuant to 28 U.S.C. § 1441.

Meanwhile, the Maryland criminal prosecution also moved toward resolution. Dr. Taub appealed his six District Court convictions to the Circuit Court for Mont-

gomery County, where a jury, after a "trial de novo," returned a guilty verdict against Taub on one count (failure to provide necessary veterinary care to one monkey). The Court of Appeals of Maryland then granted a writ of certiorari and in August 1983 reversed the conviction, holding that Article 27, Section 59 of the Maryland Code did not apply to an institution conducting medical research pursuant to a federal program. *Taub* v. *State*, 296 Md. 439, 463 A.2d 819 (1983).

After the termination of criminal proceedings, the Maryland suit became the only remaining litigation over the custody of the monkeys. In 1985 the Maryland federal district court dismissed the case for lack of standing.

In June 1986, the plaintiff appealed to the Fourth Circuit. After submission of the case, the monkeys were transferred by NIH from Poolesville, Maryland, to Tulane's Delta Primate Center in Covington, Louisiana. Primate League apparently regarded the Delta Primate Center as an unsuitable custodian and objected to the 90-day quarantine that was imposed upon the primates as newly arrived animals at the facility. In the Court of Appeals, Primate League sought, *inter alia*, a show cause order for return of the primates to Poolesville, Maryland, or a transfer of custody of the primates to their designee. The Fourth Circuit, having been advised that IBR, the owner of the primates, did not object to their transfer by NIH to the Delta Primate Center, denied the motion on September 3, 1986. IBR Brief in Opposition to Certiorari in No. 86-1115, at 2.

The Fourth Circuit affirmed the District Court, stating in part—

> "In this case we must decide whether a group of private individuals may challenge a medical researcher's compliance with federal standards for the care of laboratory animals. Because we find that the plaintiffs lack standing to bring such a lawsuit, we affirm the judgment of the district court in its dismissal of this action.



> "To imply a cause of action in these plaintiffs might entail serious consequences. It might open the use of animals in biomedical research to the hazards and vicissitudes of courtroom litigation. It may draw judges into the supervision and regulation of laboratory research. It might unleash a spate of private lawsuits that would impede advances made by medical science in the alleviation of human suffering. To risk consequences of this magnitude in the absence of clear direction from the Congress would be ill-advised. In fact, we are persuaded that Congress intended that the independence of medical research be respected and that administrative enforcement govern the Animal Welfare Act." 799 F.2d at 935.

Primate League then petitioned this Court for a writ of certiorari which was denied in 1987. 481 U.S. 1004 (1987).

In 1988, NIH determined, based on the recommendation of a panel of independent experts in veterinary care, primate behavior, and neurology, that three of the monkeys should be euthanized because of the amount of distress they were experiencing. Plans were made to humanely euthanize them on December 28-31, 1988. Memorandum in Opposition to Motion to Compel (by NIH) August 11, 1989, at 3. NIH hoped to gain, through the procedure and subsequent autopsy, knowledge that might lead to improvements in rehabilitation therapy for individuals who have suffered brain or spinal cord damage. *International Primate Protection League* v. *Tulane Educational Fund*, 895 F.2d. 1056, 1058 (5th Cir. 1990).

On December 28, 1988, Primate League, PETA, and others filed suit in the Civil District Court for the Parish of Orleans in the State of Louisiana seeking, *inter alia*, injunctive relief against the "agents and officers of NIH, IBR, and the administrator of the Tulane Education Fund," and seeking custody of the monkeys. 895 F.2d at 1058, Pet. App. A-30-32.

In December of 1989, the state court issued a temporary restraining order which provided as follows:

> "It is ORDERED that a temporary restraining order be, and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the 'Silver Spring Monkeys', placed in their keeping by the National Institute of Health and/or the Institute for Behavioral Research." Appendix A.

NIH removed the case, under the authority of 28 U.S.C. § 1442(a)(1), to the United States District Court for the Eastern District of Louisiana. After removal, petitioners moved for and secured a temporary restraining order ("TRO") from the federal court which provided,

> "IT IS ORDERED that a temporary restraining order be and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the 'Silver Spring Monkeys'." Appendix B.

As the district court extended the temporary restraining order beyond the 20 days permitted by Fed. R. Civ. P. 65(b), the extended TRO became the functional equivalent of a preliminary injunction, appealable under 28 U.S.C. § 1292(a)(1). 895 F.2d at 1058.

The court below concluded that petitioners did not meet the standing requirement of Article III, and dismissed the entire case. In reaching this result the court relied heavily on the Fourth Circuit decision in the *IPPL* case. The Fifth Circuit found no merit in petitioners' contention that they could establish standing under state law because, as the court properly held, standing in federal courts, including removed actions, is governed exclusively by Article III of the Constitution. 895 F.2d at 1058-61.



## REASONS FOR DENYING THE WRIT

### I. THIS IS NOT A CASE TO RESOLVE THE QUESTION OF WHETHER OR NOT A FEDERAL AGENCY CAN REMOVE TO FEDERAL COURT UNDER 28 U.S.C. § 1442(a)(1), WHEN RELIEF IS SOUGHT ONLY AGAINST THE AGENCY; IN THIS CASE, THE PETITION SEEKS INJUNCTIVE RELIEF NOT ONLY AGAINST THE AGENCY (NIH) BUT ALSO AN INJUNCTION AGAINST THE "AGENTS, OFFICERS, REPRESENTATIVES" OF NIH.

Petitioners are correct that the district courts are divided on the question of whether a federal agency, in an action seeking relief only against a federal agency, can remove the case to federal court under 28 U.S.C. § 1442(a)(1); the statute on its face authorizes removal by "any officer of the United States or any agency thereof," but not by the agency itself.

The Courts of Appeals are also divided on this question. The Fifth Circuit in the opinion below, and in other cases, and the Eighth Circuit in *Johnson* v. *Showers*, 747 F.2d 1228 (8th Cir. 1984), have held that the objective of the statute can be better achieved by permitting agencies, as well as their officers, to remove cases to federal court. This would seem to be the sounder view where the agency's officers and agents could be bound by an injunction against it. Fed. R. Civ. P. 65(d). Only the Third Circuit has taken the opposite view. *See Lovell Mfg., Div. of Patterson-Erie Corp.* v. *Export-Import Bank of the United States*, 843 F.2d 725 (3d Cir. 1988).

The *Lovell* case involved a suit against the Export-Import Bank of the United States ("Eximbank") and the Foreign Credit Insurance Association ("FCIA"), an association of private insurance companies formed to support Eximbank's statutory mandate of promoting United States exports. 843 F.2d at 727. Originally one claim by the exporter, Lovell, was against FICA on a commercial

risk policy. A second claim was against Eximbank on a political risk policy. *Id.*

Shortly after the case was removed from state to federal court, Lovell dropped the political risk claim. Accordingly, the litigation was "predominantly, if not exclusively, a state law claim against an association of private insurance companies." 843 F.2d at 728, 732. Eximbank's only involvement was based on a separate reinsurance agreement with FCIA to which Lovell was not a party. *Id.* Thus Eximbank was only a "nominal defendant" and as the court observed ". . . no reason appears why Eximbank has not been formally dismissed from this case." 843 F.2d at 731 n.8.

The action could not have resulted in a judgment against Eximbank. Eximbank's "tangential interest" [2] was in not having a reinsurance contract claim made by FCIA against the United States, presumably in the United States Claims Court under 28 U.S.C. § 1491 (1982). In no event could there be a judgment for Lovell granting relief against an officer of Eximbank either in the pending case or in follow-up litigation.

Since, as the Third Circuit concluded, "the purpose of a section 1442 removal is to protect federal officials from unfriendly state forums . . . for conduct performed under color of federal office," it reasoned that it was doubtful that allowing removal where relief could be secured only against private insurance companies would serve any such purpose. 843 F.2d at 734 n.13. Accordingly, a remand to state court was directed. 843 F.2d at 735.

However, in this case, petitioners sought injunctive relief not only against NIH but also against its officers. Pet. App. A-30-32. We are not aware of any case that holds that removal under Section 1442(a)(1) is precluded where, as here, injunctive relief is specifically sought

[2] 843 F.2d at 733.



against the "agents, officers, representatives" of a federal agency. Consequently, there is no contra-authority, nor is there a split between circuits applicable to the controlling facts of this case.

The officers of NIH are not named as defendants in the caption. However, it would be excessively formalistic to condition removal on the style of the case, rather than on the relief sought against federal officers. For example, in *Johnson* v. *Showers*, *supra*, the Eighth Circuit allowed a Section 1442(a)(1) removal by an agency ". . . based on the government's unopposed view that the action should be deemed as one brought against FEMA's Director . . ." even though the Director was not listed in the caption. 747 F.2d at 1229.

In *Willingham* v. *Morgan*, 395 U.S. 402, 406-07 (1969), this Court held that 28 U.S.C. § 1442 was to be broadly construed "to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law."

Usually, to avoid the defense of sovereign immunity, suits to enjoin governmental conduct are nominally brought against officers or agents of a government agency alleging that the officer or agent was acting in excess of his authority, or that his conduct was not legally justified. *See, e.g., Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Blackmar* v. *Guerre*, 342 U.S. 515 (1952).

Such suits are disfavored where, as here, property in which the government has an interest is involved, or governmental functions may be affected. As this Court stated in *Larson*, *supra*, at 703:

> "The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, 'The interference of the Courts with the performance

> of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief. . . .' "

In light of these important public policy considerations, applicable to actions such as this one, the availability of removal to federal courts should be based on the reality of the relief sought. It should not turn on such irrelevant factors as the incompetence or deviousness of counsel who draft the petition.

The Fifth Circuit was clearly correct in permitting the removal under 28 U.S.C. § 1442(a)(1). This is not a case to review the separate question of whether removal under Section 1442(a)(1) is proper in a state court action against an agency in which relief is not sought against its officers or agents.

## II. THE FOURTH CIRCUIT IN THE *IPPL* CASE NEITHER HELD NOR IMPLIED THAT A SUIT IN STATE COURT UNDER STATE LAW, SEEKING RELIEF AGAINST THE OFFICERS AND AGENTS OF NIH, IBR, AND TULANE, COULD NOT BE REMOVED TO FEDERAL COURT PURSUANT TO SECTION 1442(a)(1) WHERE FEDERAL COURT STANDING WOULD BE REQUIRED.

Petitioners misconstrued the implications of *International Primate Protection League* v. *Institutes for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986). They argue that the refusal of the court to take jurisdiction over their state law claims against NIH implied a determination that removal of a similar action under Section 1442(a)(1), when filed in Louisiana would not be proper, and that *res judicata* precluded relitigation of the jurisdictional issue in the Louisiana action. Pet. 11-13.

The Fourth Circuit case did not involve Section 1442 in any respect. The removal, exclusively under Section 1441(a), was based on the existence of a federal question. Since, before trial, standing was found to be lacking as



to the federal claims, the state law claims were dismissed rather than remanded pursuant to the rule of *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715 (1966).

The situation is entirely different when a case is removed under Section 1442(a). To protect the interest of federal officers, and the federal government, the entire case is removed and state law issues are decided in federal court even in the absence of a federal question and notwithstanding that the action would not be within the original jurisdiction of the federal court. *Mir* v. *Frostburg*, 646 F.2d 342, 344 (9th Cir. 1980).

Consequently, there was no *res judicata* effect favorable to petitioners. The Fourth Circuit opinion could only have been *res judicata* as to the absence of U.S. Const. Art. III federal court standing.

Once the removal was effected, Article III principles of standing become applicable to the state claims, as the court below held. 895 F.2d at 1061. Since Primate League was again seeking custody of the monkeys, *res judicata* precluded relitigation of the Fourth Circuit's determination that petitioners lacked federal court standing with respect to the removed claims. *Cf. Robinson* v. *National Cash Register Co.*, 808 F.2d 1119, 1124-25 (5th Cir. 1987).

## III. THE FEDERAL INTEREST JUSTIFYING REMOVAL IS CLEARLY ESTABLISHED BY THE RELIEF SOUGHT BY PETITIONERS, AND THE TEMPORARY RESTRAINING ORDER THEY SECURED AGAINST NIH AND ITS AGENTS.

The federal interest justifying removal is readily apparent. In the District Court NIH submitted a declaration of Dr. William F. Raub, then Deputy Director of NIH, which contains the following statement:

> "As custodian of the animals, NIH will continue to exercise its best judgment to carry out its plan, developed in consultation with experts in veterinary

care, rehabilitation medicine and primate behavior, that: (1) the unoperated animals be introduced into group-living arrangements appropriate to maintaining their long-term well-being; and (2) the experimentally disabled animals be cared for individually until euthanasia is required because of significant pain or distress or they die of natural causes. To date, IBR has acquiesced to NIH retaining custody and control of the animals and to the actions NIH has taken to carry out its plan." Appendix C, para. 8.

The NIH role was well known. On June 3, 1988, the United States General Accounting Office issued a report to Congress concerning the cost incurred by the federal government in caring for the monkeys. That report states in part:

> "Table 1 shows the composition of the government's $105,084 cost, as of February 29, 1988, for the care of the Silver Spring Monkeys." *Research Animals*, Federal Costs for Care of the Silver Spring Monkeys, GAO/HRD-88-89 (B-230545), at 4.

Of that amount, NIH estimated that it had spent $11,600 for litigation involving the monkeys, not counting costs incurred by the United States Attorney's Office. *Id.* at 6-7.

Consequently, it was not surprising that petitioners, when they filed their state court action, named NIH as a defendant and sought relief not only against NIH, but also its "agents, officers, representatives, employees." Pet. App. A31-32.

The Civil District Court for the Parish of Orleans on December 29, 1988 issued a TRO which provided as follows:

> "IT IS ORDERED that a temporary restraining order be, and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of



> those macaque monkeys known as the 'Silver Spring Monkeys', placed in their keeping by the National Institutes of Health and/or the Institute for Behavioral Research." Appendix A.

After the case was removed to federal court, petitioner sought a TRO against "NIH and their agents, attorneys, and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys know as the 'Silver Spring Monkeys.'" Appendix B.

The District Court then issued a TRO which provided:

> "IT IS ORDERED that a temporary restraining order be and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys, and servants, from inhumane treatment, or euthanasia or other destruction of monkeys known as the 'Silver Spring Monkeys'." Appendix B, at 2.

Having sought and secured injunctive relief against NIH and its "agents, officers. representatives," petitioners are in no position to contend that there is no federal interest to be protected in federal court. The record establishes that not withstanding NIH's interest in its research protocol announced in December 1988, the euthanasia and experimentation were not conducted until after the TRO was vacated.

The federal interest is "direct and substantial" when an agency of the United States may be bound by a judgment or order in the action. *Lovell*, 843 F.2d at 733 n.12.

## IV. THE COURT BELOW PROPERLY CONCLUDED THAT PETITIONERS LACKED STANDING TO ASSERT THEIR STATE LAW CLAIMS.

Petitioners concede that the Fourth Circuit in *IPPL* was correct in denying them federal court standing under the Animal Welfare Act. Pet. 21. They attempt to distinguish *IPPL* on the ground that only in this Fifth Cir-

cuit action do they seek access restoring custody of the monkeys. *Id.* This argument is incorrect. In the Maryland action, petitioners sought to be made guardians of the monkeys, and the Fourth Circuit specifically stated in its opinion that "[p]laintiffs also argue that Maryland law supports their claim for custody of the monkeys." 799 F.2d at 940-41. Consequently, the relief sought does not serve to distinguish the case below from the Fourth Circuit case.

Secondly, petitioners contend that their state law claims seeking "abatement of a public nuisance," and for "tortious negligence and intentional infliction of emotional distress," should not have been dismissed because they "would have easily cleared the standing hurdle in state court." Pet. 18-19. However, the Court below correctly held the Article III standing must be established under federal, not state law, principles. *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 804 (1985). This rule applies to cases originally filed in state court and removed to federal court. *Associated General Contractors* v. *Otter Tail Power Co.*, 611 F.2d 684, 686, 691-94 (8th Cir. 1979) (state law claims preempted).

Particularly in the case now under review, the application of federal law criteria to the standing issue was necessary to effectuate the federal purpose of furthering research with animals with the objective of curing the "afflictions of mankind," and precluding interference with scientists engaged in animal research.

These clearly articulated federal objectives were emphasized in the Fourth Circuit *IPPL* case. The court stated:

> "The Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.*, is the federal statute on which plaintiffs rely in defining their allegations of mistreatment. The Act seeks to insure that 'animals intended for use in research facilities . . . are provided humane care and treatment.' 7 U.S.C. § 2131(1). There is no indica-



tion, however, that Congress intended this goal to come at the expense of progress in medical research. To the contrary, both the language of the statute and the means chosen by Congress to enforce it preserve the hope that responsible primate research holds for the treatment and cure of humankind's most terrible afflictions. The statutory design is, in turn, inconsistent with the private right of action that plaintiffs assert. A review of the Act thus underscores two points. One is a commitment to administrative supervision of animal welfare. The other is the subordination of such supervision to the continued independence of research scientists. The Secretary's rule-making authority does not extend to the design of experiments; the Secretary's enforcement authority does not extend to the confiscation of animals in use. In the words of Congress, 'Under this bill the research scientist still holds the key to the laboratory door.' H.R. Rep. No. 91-1651, 91st Cong., 2nd Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 5103, 5104. *See also* S. Rep. No. 1281, 89th Cong., 2nd Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 2635, 2637.

> "The *amicus curiae* brief of sixty-eight scientific and medical organizations reviews the history underlying these priorities. Research with primates helped to lead, for example, to the development of the polio vaccine, and other animal research has contributed to the discovery of insulin, the invention of transplantation techniques, and the improvement of cancer therapies. *Amici* predict that animal research will play some part in the prevention and treatment of such illnesses as multiple sclerosis, AIDS, and Alzheimer's disease. Recent amendments to the Animal Welfare Act have accordingly reaffirmed the Congressional finding that 'the use of animals is instrumental in certain research and education or for advancing knowledge of cures and treatments for diseases and injuries which afflict both humans and animals.' H. Conf. Rep. No. 99-447, 99th Cong., 1st Sess., *reprinted in* 1985 U.S. Code Cong. & Ad. News 1676, 2518.

> "Consistent with this purpose, Congress crafted a comprehensive plan for the regulation, inspection, and sanction of medical facilities that utilize animals in research. It is clear that the supervisory goals of the statute were to be realized through a regime of administrative enforcement, with the right of judicial review for an aggrieved facility. 7 U.S.C. § 2149(b). *It is equally clear that these goals were not to be realized through a succession of private lawsuits.*" 799 F.2d at 939-40. (Emphasis supplied.)

In order to protect the federal interest described in *IPPL*, federal preemption of inconsistent state law is clearly required. This Court in *Boyle* v. *United Technologies Corp.*, 482 U.S. 500 (1988), a case involving the government contractors' liability in tort to third parties, set forth as follows the considerations applicable to the displacement of state law.

> "Displacement will occur only where, as we have variously described, a 'significant conflict' exists between an identifiable 'federal policy or interest and the [operation] of state law,' or the application of state law would 'frustrate specific objectives' of federal legislation. . . The conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field which States have traditionally occupied.' . . . Or to put the point differently, the fact that the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce preemption into one that can. But conflict there must be. In some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules. . . . In others, the conflict is more narrow, and only particular elements of state law are superseded." 487 U.S. at 507-08 (citations and footnotes omitted).

Viewed in this context, the federal policy of funding animal research in an effort to cure illness, maintaining



the independence of research scientists and precluding private lawsuits under the Animal Welfare Act in favor of administrative enforcement of animal care in research facilities, would be frustrated if litigants, such as petitioners, had standing to bring lawsuits based on state tort and nuisance laws to secure custody of research animals or to otherwise disrupt ongoing research.[3] Under the Animal Welfare Act, the Secretary of Agriculture is precluded from promulgating regulations "with regard to the design, outlines, or guidelines of actual research or experimentation by a research facility . . . or orders with regard to the performance of actual research or experimentation." 7 U.S.C. § 2143 (1982) (codified as amended at 7 U.S.C. § 2143(a)(6)(a)(i)(ii) (Supp. V 1987)). In addition, the Act provides that nothing "shall authorize the Secretary, during inspection, to interrupt the conduct of actual research or experimentation." *Id.* at (iii).

It is therefore clear that petitioners were seeking custody of privately owned research animals entrusted to NIH, relief which would not even be available to the Secretary of Agriculture under the Animal Welfare Act since granting it would serve "to interrupt the conduct of actual research or experimentation."

Under the Animal Welfare Act "the research scientist holds the key to the laboratory door." *IPPL*, 799 F.2d at 939. It would be inconsistent with this policy to hand out additional keys to animal rights activists permitting them to interrupt animal research by asserting causes of action based on state law to secure custody of privately owned, federally funded research animals.

The Fifth Circuit, after removal, properly applied Art. III standing concepts to the Petition for Declarative and/or Injunctive Relief.

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[3] Federal preemption is equally applicable to state law causes of action against scientists engaged in animal research asserted in state courts.

## CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(202) 244-8688
*Attorney for Respondent Institutes for Behavior Resources, Inc.*

*Of Counsel*
RAYMOND D. KLINE

October 31, 1990

* Counsel of Record

# APPENDICES

## APPENDIX A

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS

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No. 88-24949 Division C Docket 5

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INTERNATIONAL PRIMATE PROTECTION LEAGUE, *et al.*

versus

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, *et al.*

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### TEMPORARY RESTRAINING ORDER

Considering the above and foregoing verified petition for temporary restraining order and preliminary and permanent injunction, and for good cause shown,

IT IS ORDERED that a temporary restraining order be, and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, their agents attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the "Silver Spring Monkeys", placed in their keeping by the National Institute of Health and/or the Institute for Behavioral Research,

IT IS FURTHER ORDERED that Petitioners post security in the amount of $15,000.00.

IT IS FURTHER ORDERED that Petitioners' request for Preliminary Injunction be, and the same is hereby

set for hearing on the 6th day of January, 1989, at 10: o'clock, A.M.

THUS DONE AND SIGNED this 29th day of December, 1988, New Orleans, Louisiana.

/s/ [Illegible]
Judge



**APPENDIX B**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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Civil Action No. 88-5713

Section: L Mag. 2

INTERNATIONAL PRIMATE PROTECTION LEAGUE, *et al.*

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, *et al.*

---

MOTION AND ORDER FOR TEMPORARY RESTRAINING ORDER

[Filed June 5, 1989]

NOW COME plaintiffs International Primate Protection League (IPPL), People for the Ethical Treatment of Animals (PETA), and Louisiana in Support of Animals and move the Court for a temporary restraining order enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the "Silver Springs Monkeys."

Date of Entry Jan. 3, 1989

/s/ Margaret Woodward
MARGARET E. WOODWARD
Bar No. 13677
610 Poydras St., Suite 318
New Orleans, LA 70130
Phone: 504-525-9538
Attorney For

## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January 1989 a copy of this pleading has been served upon each other party to this action by depositing same in the United States mails properly addressed to his her or its counsel of record, first class postage, prepaid.

/s/ Margaret E. Woodward
MARGARET E. WOODWARD



## TEMPORARY RESTRAINING ORDER

Considering the verified petition for temporary restraining order and preliminary and permanent injunction, and for good cause shown,

IT IS ORDERED that a temporary restraining order be and the same is hereby issued, enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction of those macaque monkeys known as the "Silver Springs Monkeys."

This order to remain in effect through midnight, February 1, 1989, unless otherwise terminated.

THUS DONE AND SIGNED this 6th day of January, 1989, New Orleans, Louisiana.

/s/ Veronica D. Weicker
United States District Judge

## APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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Civil Action No. 88-5713

INTERNATIONAL PRIMATE PROTECTION LEAGUE, *et al.*

v.

ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND, *et al.*

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DECLARATION OF WILLIAM F. RAUB, PHD.

WILLIAM F. RAUB declares:

1. I am the Deputy Director of the National Institutes of Health (NIH). I have served in that capacity since August 1986. I began work with the NIH in 1966 and have served in various jobs of increasing responsibility since that time. In 1979, I was appointed the Associate Director for Extramural Research and Training. During my tenure in that position, I was responsible for all NIH activities involving the nonhuman primates that are popularly known as the "Silver Spring Monkeys." That responsibility continued when I was appointed Deputy Director. Accordingly, I have thorough knowledge of the NIH actions and responsibilities regarding those animals.

2. On October 9, 1981, the Circuit Court for Montgomery County Maryland ordered that all primates seized by the Montgomery County Police from the Behavioral Biology Center for the Institute for Behavioral Research (IBR), the owner of the monkeys, be placed in the care



and custody of the NIH. A copy of that order is attached hereto as Exhibit A. By its terms, the order remained in effect until further order of the court or termination of the pending criminal prosecution against Dr. Taub, the chief investigator for IBR. On October 14, 1981, NIH took custody of the monkeys and began caring for them at its animal facility in Poolesville, Maryland.

3. On December 2, 1981, the District Court for Montgomery County convicted Dr. Taub on six counts of animal cruelty. Five of the six counts were later overturned by the Circuit Court for Montgomery County. On August 10, 1983, the Maryland Court of Appeals overturned the remaining criminal conviction of Dr. Taub. This terminated the criminal prosecution against Dr. Taub and thus, the order placing the animals in the care and custody of NIH expired on that date. However, NIH continued to care for the animals in order to maintain the status quo pending resolution of the suit seeking custody of the monkeys brought by the International Primate Protection League, The People for the Ethical Treatment of Animals and other groups and individuals in the Federal District Court for the District of Maryland.

4. During the spring of 1986, while the litigation was pending before the United States Court of Appeals for the Fourth Circuit, many members of Congress and the general public urged the NIH to turn the monkeys over to a private primate facility that does not endorse animal experimentation. The NIH determined that it could not do so in view of the significance of the pending litigation, indications that the facility in question did not meet even the minimum requirements of the Animal Welfare Act and the absence of authority to act independently of the owner of the monkeys, the Institutes for Behavioral Resources, Inc., the successor organization of the IBR. In order to respond as best it could to the

strong expression of public interest, the NIH proposed that the IBR monkeys be excepted from further invasive research, be allowed to live in a first-class facility and be resocialized to the extent possible. Because NIH facilities are not fully suitable for such a resocialization attempt, the monkeys were transfered on June 23, 1986 to the Delta Regional Primate Research Center in Convington, Louisiana. Although NIH notified the other parties in the litigation and the United States Court of Appeals for the Fourth Circuit of the move on the day it occurred, the decision to move the animals was made by the NIH on the basis of its responsibility for the care of the monkeys.

5. On the date of the transfer, NIH forwarded a letter of agreement to the Chancellor of the Tulane University School of Medicine, which operates the Delta Center. A copy of that agreement, signed by the Chancellor, is attached hereto as Exhibit B. The agreement states that "the Delta Center is acting strictly as an aide to NIH in its role as . . . custodian [for the monkeys]." The agreement further requires Delta to consult with NIH regarding all clinical care decisions except routine or emergency clinical procedures.

6. During the period the monkeys were cared for at the NIH Poolesville facility, NIH incurred costs of $51,860. These costs were paid by the NIH because the court order placing the animals in the custody of NIH made no provision for payment by any other party, and NIH viewed itself as providing a public service at the behest of the court. During the period the monkeys have been cared for at the Delta Center, Delta has charged NIH $45,086.14 for care and maintenance, security, administrative costs and miscellaneous supplies. To date, IBR has reimbursed NIH $29,622.54 for these costs, stating that it will reimburse NIH only for the standard daily charge of $1.82 for each animal.



7. On September 1, 1987, five of the monkeys that had not had surgery were transferred to the San Diego Zoo in order to complete the resocialization process begun at the Delta Center. Attached as Exhibit C is a copy of the July 21, 1987 letter confirming the agreement between NIH and the San Diego Zoo. As stated in the letter agreement, NIH took this action in its role as custodian of the primates owned by the IBR.

8. As custodian of the animals, NIH will continue to exercise its best judgment to carry out its plan, developed in consulation with experts in veterinary care, rehabilitation medicine and primate behavior, that: (1) the unoperated animals be introduced into group-living arrangements appropriate to maintaining their long-term well-being; and (2) the experimentally disabled animals be cared for individually until euthanasia is required because of significant pain or distress or they die of natural causes. To date, IBR has acquiesced to NIH retaining custody and control of the animals and to the actions NIH has taken to carry out its plan.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Date: 1-27-89

/s/ William F. Raub
WILLIAM F. RAUB, PH.D.
Deputy Director, NIH